

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Marshall Helmberger,

Complainant,

vs.

**ORDER GRANTING PETITION  
FOR RECONSIDERATION**

Johnson Controls, Inc.,

Respondent.

On July 27, 2011, Marshall Helmberger filed a Complaint with the Office of Administrative Hearings alleging that the Respondent Johnson Controls, Incorporated (Johnson Controls) violated the Minnesota Government Data Practices Act (Data Practices Act) by denying him access to a copy of a subcontract between Johnson Controls and Architectural Resources, Incorporated (ARI). Pursuant to Minnesota Statutes § 13.085, subd. 3(a), the Chief Administrative Law Judge assigned the matter to Administrative Law Judge Eric L. Lipman on July 28, 2011.

After reviewing the Complaint and supporting materials, the Administrative Law Judge determined that the Complaint did not present sufficient facts to establish probable cause to believe that a violation of Data Practices Act occurred. Accordingly, in an Order dated September 14, 2011, the Administrative Law Judge dismissed the Complaint.

On September 23, 2011, the Complainant filed a Petition for Reconsideration of the Administrative Law Judge's Order of Dismissal with the Chief Administrative Law Judge, pursuant to Minnesota Statutes § 13.085, subd. 3(c).

Mark R. Anfinson, Attorney at Law, appeared on behalf of the Complainant, Marshall Helmberger.

David L. Lillehaug and Christopher A. Stafford, of Fredrikson & Byron, P.A., appeared on behalf of Johnson Controls.

Based on the record herein, and for the reasons stated in the following Memorandum, the Chief Administrative Law Judge makes the following:

## ORDER

**IT IS HEREBY ORDERED** that Complainant's Petition for Reconsideration is GRANTED.

Dated: October 4, 2011

s/Raymond R. Krause  
RAYMOND R. KRAUSE  
Chief Administrative Law Judge

## MEMORANDUM

### Factual Background

Independent School District 2142 (School District) entered into a contract with Johnson Controls for project management, construction and architectural services relating to the construction and the renovation of schools in New Independence and Field Townships.<sup>1</sup>

In January 2011, Marshall Helmberger, Publisher and Managing Editor of the Timberjay Newspapers, made a request for contract-related documents under the Data Practices Act. Specifically, Mr. Helmberger requested that Johnson Controls produce for his inspection a copy of the subcontract between Johnson Controls and ARI.<sup>2</sup> The School District does not possess, nor did it request under its prime contract with Johnson Controls, a copy of this subcontract.<sup>3</sup>

Johnson Controls refused to make the requested disclosures, asserting that it does not have a legal duty to furnish these documents to Mr. Helmberger or other members of the public.<sup>4</sup>

On September 14, 2011, the Administrative Law Judge issued an Order finding no probable cause to believe that Johnson Controls violated the Data Practices Act. On September 23, 2011, the Complainant requested reconsideration of the Dismissal Order. Minnesota Statutes § 13.085, subd. 3(c), provides that the Chief Administrative

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<sup>1</sup> Complaint, Attachment A at 1.

<sup>2</sup> *Id.* at 1-2.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.*; Johnson Controls' Request for Dismissal, at 5.

Law Judge must review a petition for reconsideration within ten business days to determine whether the assigned administrative law judge made a “clear material error.”

### **Timeliness of Petition**

As an initial matter, Johnson Controls argues that the Complainant’s petition for reconsideration is untimely and should not be considered.

Minnesota Statutes § 13.085, subd. 3(c), states that “[a] petition for reconsideration may be filed no later than five business days after a complaint is dismissed . . .”. The Order dismissing the Complaint in this matter was entered on September 14, 2011, and was served on the parties by United States mail on that same day. The Office of Administrative Hearings, in conformance with the Minnesota Rules of Civil Procedure, allows three days to be added to a prescribed filing deadline when an order is served by U.S. mail.<sup>5</sup> Therefore, Complainant’s petition, which was postmarked September 23, was timely filed and will be considered.

The Chief Administrative Law Judge also notes that Marshall Helmberger filed his own Petition for Reconsideration on September 23, 2011, in addition to the one submitted by his attorney Mark Anfinson. In his petition, Mr. Helmberger complained that the OAH had not mailed him a copy of Judge Lipman’s Dismissal Order. On his original complaint form, Mr. Helmberger listed Mr. Anfinson as his attorney, and in a letter filed with the Office on September 8, 2011, Mr. Anfinson confirmed that he represented Mr. Helmberger and Timberjay Newspapers in this matter. Based on these representations, a copy of the Dismissal Order was mailed to Mr. Anfinson as counsel for Mr. Helmberger. Mr. Helmberger has since filed a letter withdrawing his petition for reconsideration, and requesting that Mr. Anfinson’s petition be considered instead.

### **Reconsideration Argument**

Minnesota Statutes Sec. 13.05, subd. 11, provides:

Privatization. (a) If a government entity enters into a contract with a private person to perform any of its functions, the government entity shall include in the contract terms that make it clear that all of the data created, collected, received, stored, used, maintained, or disseminated by the private person in performing those functions is subject to the requirements of this chapter and that the private person must comply with those requirements as if it were a government entity. The remedies in section 13.08 apply to the private person under this subdivision.

(b) This subdivision does not create a duty on the part of the private person to provide access to public data to the public if the public data are available from the government entity, except as required by the terms of the contract.

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<sup>5</sup> See, Minn. R. Civ. Pro. 6.05, Minn. R. 1400.6100, subp. 2.

The Complainant alleged that Johnson Controls was undertaking a "government function" when it was hired by the School District to manage and oversee the construction and renovation of the district schools, and that it therefore stands in the place of the School District for purposes of the Data Practices Act and is required to disclose the requested subcontract.

In dismissing the Complaint, the Administrative Law Judge interpreted the phrase "government functions" to mean those governmental duties that involve decision-making or policy-making roles.<sup>6</sup> While the Administrative Law Judge agreed that construction of school facilities furthers a public purpose, he found that not every contract for such work includes or implies the transfer of governmental duties to the private contractor. According to the Administrative Law Judge, the provisions of Minn. Stat. § 13.05, subd. 11, are meant to be directed at a narrow category of contracting where state or local governments transfer governmental duties and decision-making to a non-public entity. The Administrative Law Judge held that the mere act of selling goods or services to a government agency does not involve a policy-making role and should not subject a private contractor to the obligations of the Data Practices Act.<sup>7</sup>

In support of his interpretation of Minn. Stat. § 13.05, subd. 11, the Administrative Law Judge cited to the Minnesota Court of Appeals decision in *WDSI, Inc. v. County of Steele*.<sup>8</sup> In that case, the Court of Appeals found that an architectural firm hired by Steele County to design and build a public jail was fulfilling a governmental function and was therefore subject to the Data Practices Act. The Administrative Law Judge noted that the contractor was not simply operating for its own account following the award of the contract. Instead, it was undertaking a policy role for Steele County by deciding which companies were eligible to compete for later public contracts. According to the ALJ, *WDSI* stands for the proposition that if a contractor is hired to undertake decision-making like that which is associated with operating a state hospital or a public procurement system, it is "administering the affairs of the state" in the place of government officials and thus is subject to the Data Practices Act.<sup>9</sup>

Based on his reading of the statute and his finding that the overall duty and authority to construct public schools remains in the hands of District officials even after the contract was awarded to Johnson Controls, the Administrative Law Judge concluded that Johnson Controls was not undertaking a government function within the meaning of the statute when it performed under the construction contract and therefore was not subject to the duties imposed by the Data Practices Act.

In his petition for reconsideration, the Complainant argues that the language of Minn. Stat. § 13.05, subd. 11, states unambiguously that "if a government entity enters into a contract with a private person to perform *any of its functions*," the Data Practices

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<sup>6</sup> Order of Dismissal (September 14, 2011) at 4-5.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> 672 N.W.2d 617, 620-21 (Minn. App. 2003).

<sup>9</sup> *See, id.*

Act applies.<sup>10</sup> The Complainant asserts that the ALJ is reading a distinction into the statute that simply does not exist. According to the Complainant, the Administrative Law Judge's conclusion that the statute is limited to only those situations where government entities transfer duties and decision-making authority to non-public entities is pure invention and conflicts with precedent. The Complainant points out that in advisory opinion 11-005, the Commissioner of Administration found that Johnson Control is performing a governmental function and did violate the Data Practices Act when it refused to provide Mr. Helmberger with the data he sought. The Commissioner noted that Minn. Stat. § 123B.02, subd. 2, provides that "it is the duty *and the function of the district* to furnish school facilities to every child of school age residing in any part of the district ..."<sup>11</sup>

The Complainant also argues that contrary to the ALJ's reasoning, the Court of Appeals decision in the *WDSI* case supports finding that Johnson Controls is subject to the Data Practices Act. According to the Complainant, Johnson Controls was hired by the school district to perform services even more extensive than those provided to Steele County by the architectural firm. Under the terms of the various contracts that Johnson Controls entered into with the School District, Johnson Controls furnished the school district with long term strategic planning, financial modeling, public relations, concept planning, environmental permitting, architectural and engineering design, web site services, bid specifications and analysis, and project management. In addition, the Complainant asserts that Johnson Controls or its subconsultants, had the authority to decide which contractors were qualified, and Johnson Controls had the authority to hire architects on its own without the approval of the school board. Thus, according to the Complainant, even if one accepts the Administrative Law Judge's distinction with respect to "government function," Johnson Controls' involvement with the school district meets that standard.

### **Probable Cause Standard**

The purpose of a probable cause determination is to determine whether, given the facts disclosed by the record, it is fair and reasonable to hear the matter on the merits.<sup>12</sup> If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, a motion to dismiss for lack of probable cause should be denied.<sup>13</sup> The task is simply to determine whether the facts available establish a reasonable belief that Johnson Controls violated the Data Practices Act.

The Complainant alleges that Johnson Controls undertook a government function when it contracted to oversee the construction and renovation of district schools. The contracts between the School District and Johnson Controls were not submitted with the

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<sup>10</sup> Emphasis added.

<sup>11</sup> Emphasis added. The Department of Administration's Information Policy and Analysis Division also filed a letter on September 23, 2011, explaining how it has applied the statute in the past.

<sup>12</sup> *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

<sup>13</sup> *Id.* at 903.

Complaint,<sup>14</sup> but Johnson Controls does not dispute the nature of the contracts. Moreover, the Commissioner of Administration has already issued an opinion concluding that Johnson Controls is obligated to provide the data requested.<sup>15</sup> Pursuant to Minn. Stat. § 13.072, subd. 2, the OAH is required to give some deference to this opinion.

The Chief Administrative Law Judge finds that the Administrative Law Judge committed a clear material error by dismissing the Complaint at the probable cause stage. The record presents sufficient facts to establish a reasonable belief that Johnson Controls violated the Data Practices Act by refusing to disclose to Mr. Helmberger the requested subcontract.

### **Conclusion**

The Petition for Reconsideration is granted. This matter will proceed to an evidentiary hearing to be scheduled in the near future.

**R. R. K.**

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<sup>14</sup> The contracts were submitted with the petition for reconsideration.

<sup>15</sup> Advisory Opinion 11-005 issued on May 27, 2011. See *also*, Advisory Opinion 11-001 issued on January 3, 2011.